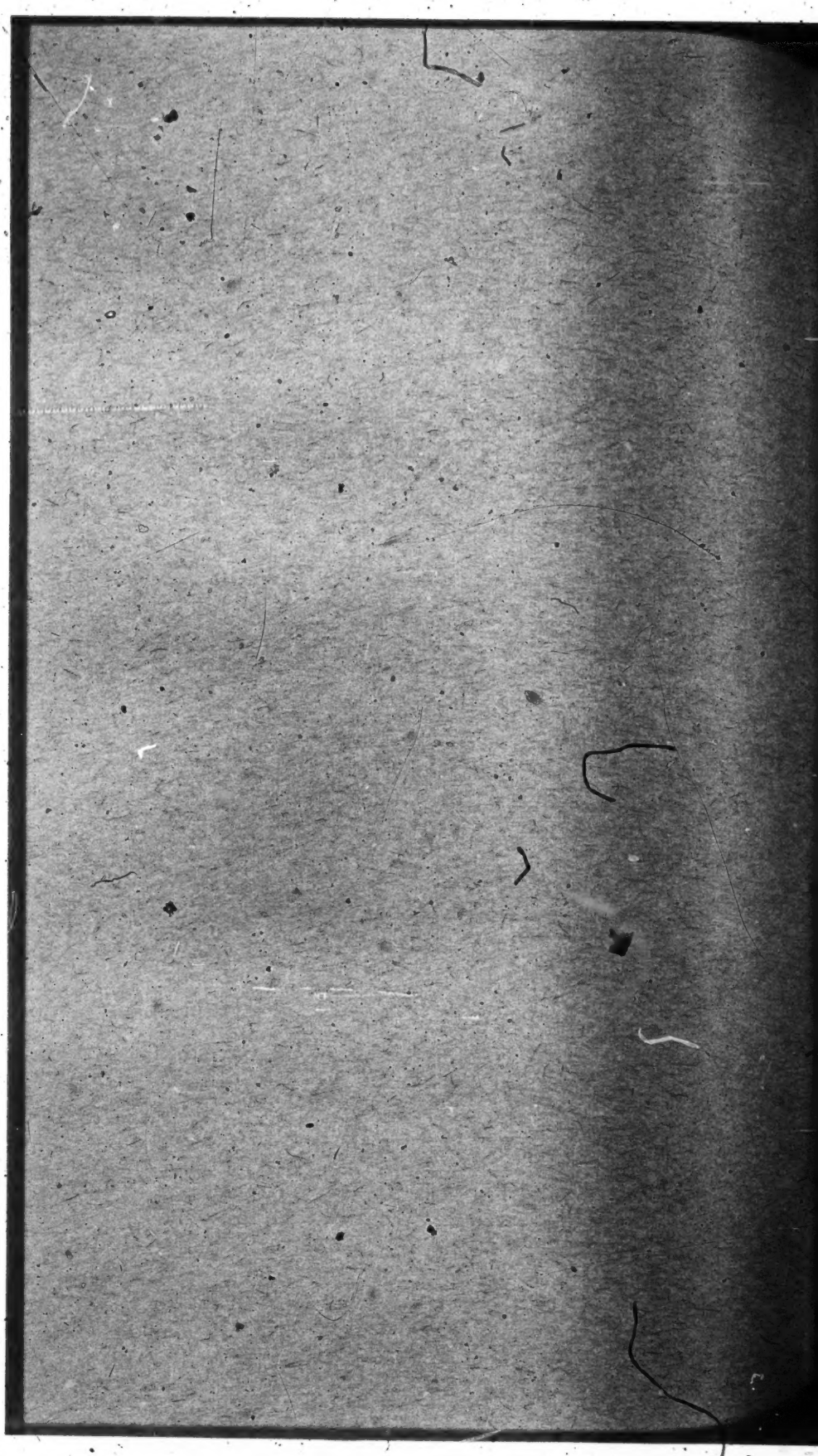

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Supreme Court of the United States

OCTOBER TERM, 1930

No. 600

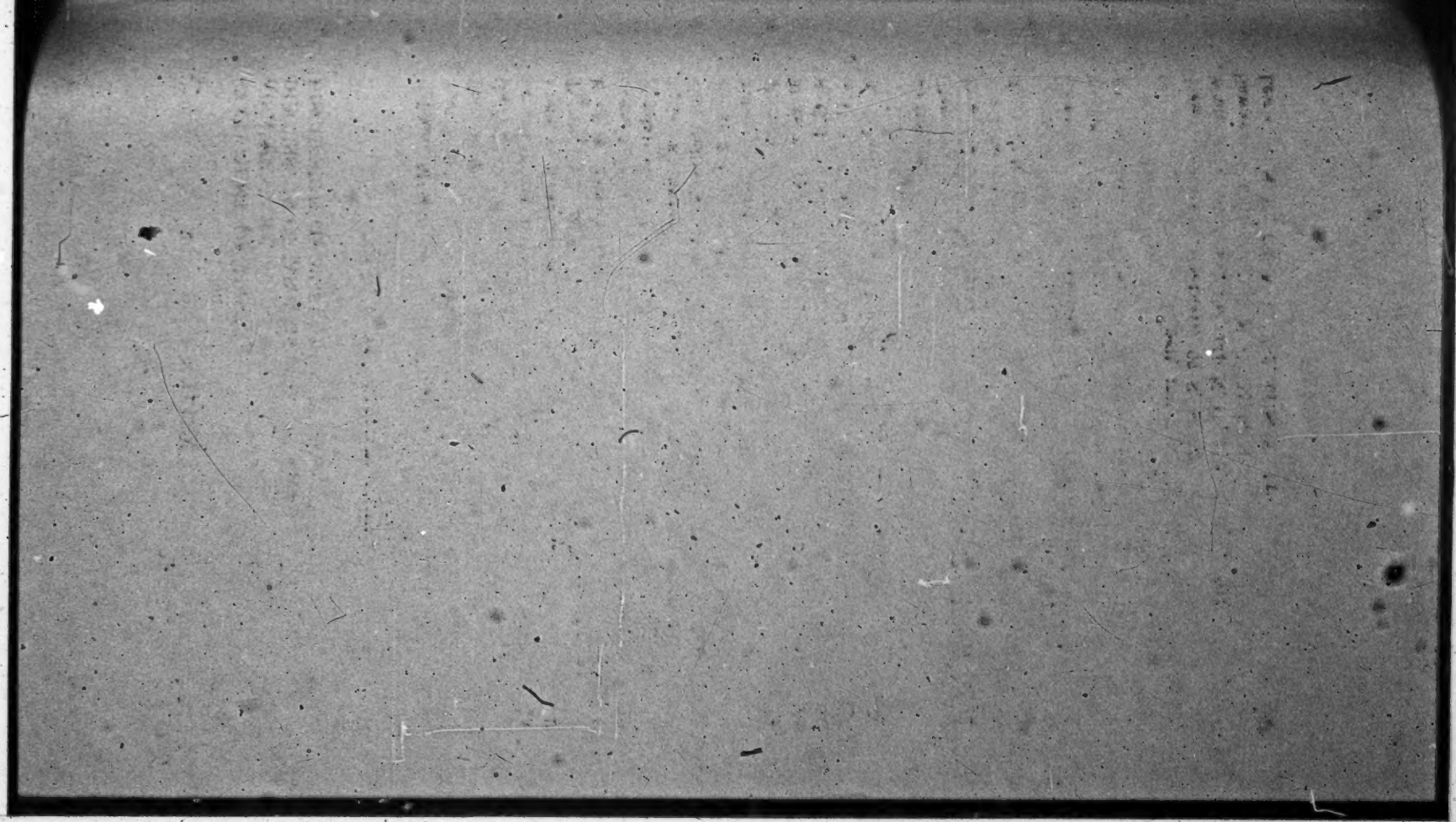
ATLANTIC COAST LINE RAILROAD COMPANY.
Petitioner,

—vs—

J. L. POWE, Administrator of George A. Marshall, Deceased, - - - - *Respondent.*

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LIONEL K. LEGGE,
of Counsel for Respondent.



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BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF CASE.

This case was before this court on a writ of error to the State Court (Atlantic Coast Line Railroad Company vs Tyner, 278 U. S. 565) and the judgment below was reversed by this court and a new trial ordered.

1. On Chicago M. & St. P. R. Co. vs Coogan, 271 U. S. 473 (on the question of evidence).

2. On Southern P. Co. vs Berkshire, 254 U. S. 415;

Ches. & O. R. Co. vs Leitch, 276 U. S. 472 (on the question of assumption of risk).

3. Gulf, C. & S. F. R. Co. vs Moser, 275 U. S. p 133 (on the question of the measure of damages).

The case has been tried and comes up again on a petition for a writ of certiorari. No question on item 3 above, on the measure of damages, is raised. The only questions remaining are those that still come under the grounds 1 and 2 above.

At the first trial, plaintiff undertook to prove the case principally by a railroad witness, who however, according to the opinion of this court, did not testify to enough to take the case out of the Coogan case or out of the Berkshire and Leitch cases.

Realizing that the case had to be tried and the issues met within these cases a radical departure was made in the character and method of proof at the second trial.

Plaintiff's intestate, George A. Marshall, was a switchman, employed by appellant to work *in its railroad yard.* He was killed while on duty on a sudden call to go out on the main line to clear up a wreck. (T. R. f. 46).

It was three o'clock in the morning of January 5th, 1923, and was dark and foggy, (T. R. ff. 13 and 94).

Marshall was married; was twenty-seven years old; was in good health. He left a widow and three children, one unborn at the time of his death. (T. R. f. 41, 42, 43). He was a good provider; made One Hundred and Eighty ($180.00) Dollars per month (T. R. f. 43, 44); paid all the family bills, and after doing so turned over Thirty or Forty Dollars per month to his wife. (T. R. f. 52). His dead body was found between twenty and twenty-five feet from a semaphore post where it lay when the Coroner

reached the scene (T. R. f. 92, 93). The Coroner found the mark where presumably he struck the semaphore post (T. R. f. 91, 92, 93) where the dew was brushed off (Id.) The Coroner subsequently held an inquest (T. R. f. 94) but not an autopsy (T. R. f. 99) and did not examine his body to see what was the cause of death (Id.). The exact cause of death being one of the missing links at the first trial, the body of Marshall was exhumed between the first and second trials, that is in February, 1929 (T. R. f. 109). Dr. J. L. Powe, his family physician, then performed an autopsy. He knew Marshall and knew he was examining the skull of George A. Marshall (T. R. f. 112). The skull was produced in court. The back of the head was crushed in (T. R. f. 113) and the condition of the skull indicated that he had received a terrific blow on the back part of the head (T. R. f. 117). His neck was broken and his spine was "disarticulated from it" (T. R. f. 118). The identity of the body was proved by both the Doctor and the Undertaker (T. R. f. 141). The condition of Marshall's skull could not have been caused by falling from the train (T. R. f. 121) but it could have been caused by coming in contact with the semaphore (T. R. f. 118). The speed of the train, as told by a witness who qualified as an expert, was between twenty-five and thirty miles per hour. (T. R. f. 153). This witness knew the location of the semaphore post (T. R. f. 145) and he assumed the speed of the train from his knowledge of how a body would be thrown after hitting the semaphore post to the point where it was found by the Coroner (T. R. f. 151). This expert witness knew the duties of a switchman (T. R. f. 155); that it was a switchman's duty to be on the ladder protecting the company's rolling stock and watching the brakes if they were out of order (T. R. f. 157); that the rocking and rolling of the train going twenty to thirty miles an hour would sway the box car from 10 to 16 inches (T. R. f. 154). A few hours after the accident there were blood stains on the north side of the semaphore casing (T. R. f. 193). The semaphore post where Marshall's body was found was on the "main line" on the Atlantic Coast Line (T. R. f. 146). Before the second trial actual

measurements were taken by a civil engineer who found that the fatal Semaphore (3911) was only four feet five and one quarter inches from the outer edge of the rail (T. R. f. 71), whereas the semaphore post just south of it was five feet nine inches from the rail, and the one just north of it was seven feet six and one-half inches from the rail (T. R. f. 73, 74, 75) and the one just north of that six feet seven and three-quarter inches (1d.). They are now in the same position as at the time of the accident. (T. R. f. 192). None of this evidence either as to the cause of death or the unusual location of the semaphore was adduced at the first trial. (It will be shown how great is the importance of this new evidence when it comes to considering the cases under which this case was sent back for a new trial and that the evidence was put in to meet clearly the Coogan case on circumstantial evidence and the Berkshire and Lietch cases on assumption of risk. And this evidence, as we will show, brought the case within the rule in Central of Georgia, Ry. Co. v. Davis, 7 Fed. (2nd Series) 269 which rule was recently in effect sustained by the United States Supreme Court by denying a writ of error,)

There was no eye-witness, but the defendant company filed its answer and set up in one of its defenses that it was the Semaphore that brought about the death. This admission of the answer was not proved *as a fact* at the first trial.

In putting in its answer, presumably based upon the testimony of its own witnesses, which it had under its control, defendant set up the cause of death, and while it made every effort to strike out from the record and take from the jury consideration of its own sworn admission, it was not permitted to do so (T. R. f. 216).

At the first trial, the force af the admissions of the answer was overlooked and the plaintiff proceed to prove the case by available evidence which this Court held insufficient.

The proof offered of the fact admitted in defendants

answer was not the whole of paragraph seven as petitoner contends. The transcript of record erroneously sets out (T. R. f. 213 et seq) the whole of the paragraph as having been put in evidence. This error was corrected by the Court Stenographer before the case was argued in the Supreme Court of South Carolina. The exact words put in evidence, bracketed in the copy of answer used at the trial and given to the Court Stenographer who copied them were:

> "Further answering said complaint****this defendant alleges that the injuries and death of the deceased were due to, and caused by the****deceased****in leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore."

The court allowed this fact to go in evidence. Defendant made no motion for a nonsuit. Such a motion *was* made at the first trial. The defendant however merely put in evidence two circulars issued by the Railroad Commission bearing on minimum distance, announced that it would introduce no evidence on the plea of cotributory negligence and closed its case. It is very important to recall this as under point II the petitioner intimates that the whole of paragraph seven of the answer was put in evidecne.

The defendant after putting in only the evidence of the rules of the railroad commission moved for a direction of verdict, which was refused.

BRIEF FOR RESPONDENT

This Court did a significant thing in sending the case back for a new trial. Instead of ordering judgment for defendant, it ordered a new trial under certain suggested authorities. At the first trial petitioner moved for a nonsuit, and the opinion of this Court means that it should have been granted. We must have proved our case at the second trial, for with the lines of proof already laid down by the Su-

preme Court it could have been readily shown on motio for nonsuit (if such had been the case) that we had aga failed. It must be obvious that we had met the controllin cases.

POINT I.

DISCUSSION OF ASSUMPTION OF RISK

In the Berkshire Case, cited by appellant, the risk wa obvious and well known. But the semaphore post in th case was a veritable death trap and was a hazard of whic not only plaintiff did not know, but had no means o knowing.

It was an extraordinary risk which was not obvious i any sense of the word and which he could not, therefor have assumed. Whatever little railroad experience Marsha had was not at the point where the accident occurred. He ha had two years experience at Florence, one hundred mil from this point. The testimony is that for "about thre months before the accident he worked in Charleston, b was called off that night on a wreck when he got killed. His body was found at the semaphore post on the *main lin*

The witness McCrady, a high-class civil engineer of Cha leston, was employed to take exact measurements on th location of the semaphore posts. He did not testify at th first trial. At the first trail, there was no testimony diffe entiating the case from the Berkshire case and bringing squarely within the case of Central of Georgia Ry. Co. Davis, 7 Fed. (2nd) 269. While it was shown conclusivel at the first trial by actual tests that the head of a man's bod "while he was leaning outward from the ladder of sai freight car" would strike against the semaphore post, ther was nothing to show that the particular semaphore pos was much closer to the track than any semaphore post nort or south of it.

The testimony of Mr. McCrady is that semaphore 3916 next south of it is six feet seven and three quarters inches from the track. A man could ride up and down night or day stretching himself to the utmost and could not possibly come in contact with that semaphore. And so of semaphore 3906, just north 3911 where Marshall was killed. That semaphore is five feet nine inches from the rail. As the test showed that only a man's head, stretched as Marshall's body was on the train that night, could reach as far as semaphore 3911, it is perfectly clear that at 3916 and 3906 Marshall would have been safe. Semaphore 3911 is so jammed up against the track that it was not safe for a man to work there. Semaphore 3911 unlike all the other semaphores, was placed just exactly where it would kill a man, especially at three o'clock in the morning and at a place with which he was unfamiliar; where he had been sent to do emergency work clearing up a wreck, and because while clearing up that wreck, the brakes of the car having gotten out of order, he was straining himself on the ladder in the interests of the master looking at the brakes. There was no reason why the company had to have the trap there. The jury knew and the photographs showed that the right of way was wide enough by moving the tracks to have permitted safety. It would have been an expense when the semaphores were installed to move the tracks over. The tracks had been put down before semaphores were invented, and it would have required moving over the tracks at this point to make way for the semaphore. The company preferred to gamble what a life might cost against the cost of moving its tracks. If the semaphore was a death trap, it would be cheaper to pay damages; and at any rate maybe nobody would ever be killed. Of course railroading is a dangerous occupation, and if semaphores were necessarily and invariably placed at that distance from the rail such as mail cranes are, that would be a risk which an employe would assume.

As there was no testimony at the first trial on the location of Semaphore 3911, for all this Court knew, the

erection of semaphores at the distance of four feet ten inches might have been necessary as a uniform custom. The case was sent back under the Berkshire case which held that "the company was not responsible for the death of an engineer killed by coming in contact with a mail crane *erected under conditions imposed by the Post Office Department.*" The company had no choice. The court said in that case:

> "In order to have *uniformity,* the Post Office Department fixes the distance of the crane from the equipment, and the length of the hooks, so that in the language of a witness for the plaintiff "the same hook that will take a sack off a train in Arizona or New Mexico will take it as it goes through eastern Kansas'. The evidence was all to the effect that this crane stood at the same distance as all the others along the road."

In other words, Berkshire's intestate could not recover because he knew or should have known as an experienced engineer that throughout the length and breadth of the land under the requirements of the Post Office Department mail cranes were placed at a certain elevation from the ground at a certain distance from the track, and this for the purpose of assuring "uniformity".

A mail crane would be a useless thing unless it were placed close enough to the track for service, but the same court held in the same case:

> "However it may be *in other cases* where there is more or less *choice* as to position, this is true as to the postal crane****In short, it would be impossible to use the contrivance with absolute certainty that no accident would happen if a man put his head out at the wrong moment."

Now in the case at bar, not only did the railroad company for its own economy violate the rule of uniformity,

but had actually put the semaphore post at a place where it was not necessary to put it if it had just moved the tracks over, and where it served a less useful purpose as a signal by being close to the track. Proof that signals are best located further away from the track is shown by the location of all the other semaphore posts. Unless the employee were advised that a certain post was as close to the rail as this one was, even as an experienced railroad man he would assume that there was no semaphore post as close as 3911, because that would not be where it would have to be in order to give the best service. The vital and controlling distinction between proof of negligence at the first trial on the question of the semaphore post and proof at the second trial, is that at the first trial no proof was offered on the question of lack of uniformity.

So much for the Berkshire case, as distinguished under the proof at the second trial. Again let us repeat that this was so different from the proof at the first trial that appellant did not move for a nonsuit. He must have thought this evidence sufficient to take the case to the jury on the point or he would have made his motion. He attempted to rebut it by putting in and proving the rule of the Railroad Commission fixing minimum clearances, which, after all, only went for what it was worth. It is quite unnecessary to repeat that this Circular of the Railroad Commission in no way absolved the defendant from negligence under all the circumstances, which was a matter for the jury to decide. If the defendant company had violated the order of the Railroad Commission and put the semaphore post closer than prescribed, that might have been held to be negligence per se. This is the principle set out in Frese vs. Chicago B. & Q. Ry. 236 U. S. p. 1 cited by petitioner. Because it did not violate the rule, but did nevertheless place the semaphore post within the danger zone we maintain left purely a question for the jury.

In the case of Toledo St. L. & W. Co. against Allen, 276 U. S. 165, 72 L. Ed. 513., (cited by petitioner) the plaintiff was injured in the railroad yards where he had

worked a year and a half checking cars during the night, the yards not being artificially lighted. It was his duty to dodge in and out of the cars and to stand in between tracks while trains were passing, and it was of course a highly dangerous branch of railroading. He was held to have assumed the risk. The Court said:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him" citing Boldt vs. Pen R. Co. 245 U. S. 445; 62 L. Ed. 385; and Ches. & O. R. Co. vs. Nixon 271 U. S. 219; 70 L. Ed. 519; and Randall vs. B. & O. R. Co. 109 U. S. 478; 27 L. Ed. 1003; and Tutle vs. Detroit G. H. & M. A. Co. 122 U. S. 189; 30 L. Ed.—

It was just the reverse in the case at bar. The decedent was not familiar with the location and he had no reason to suppose that there was any risk of a semaphore post being where it was.

As the case was sent back mainly on the point of assumption of risk under the Berkshire case and the Leitch case, we have quite naturally studied these two cases very attentively. The Leitch case deals with facts which are substantially identical with the facts of the Berkshire case. They are as like as peas in a pod. The Leitch case follows the Berkshire case foot for foot on all fours. Appellant however seems to have overlooked the Davis case as he does not cite it.

The denial of the writ in the Davis case means that neither the Berkshire nor the Leitch case is applicable to such a case as the case at bar, under the facts as brought out at the second trial.

The Berkshire and Leitch cases stand. The Davis case stands also, and it stands of course because this Court

clearly distinguished it from the Berkshire case as it will now we trust distinguish the case at bar. The Davis case is so applicable to ours that we may be pardoned for quoting it rather freely. The statement of facts of the Davis case unanimously decided by the C. C. A. (Central of Georgia Ry. Co. vs. Davis, 7 Fed. (2nd) 269) might almost have been written for the case at bar. That Court speaking said:

"This was an action under the federal Employers' Liability Act (Comp. St. 8657-8665) to recover damages for the death of Jack Davis, who at the time of his death was employed as a flagman on a passenger train of the plaintiff in error, which was proceeding from Columbus, Ga., to Birmingham, Ala. Davis was killed as a result of his person coming in contact with a mail crane platform at Arkwright, a station on plaintiff in error's railway. The case went to the jury on one count of the complaint, which alleged that the employer negligently caused or allowed said mail crane platform to come in contact with said deceased, and to which the employer pleaded the general issue in short by consent, with leave to give in evidence any matter which, if well pleaded, would be admissble in defense of the action. An exception was reserved to the court's refusal to give a requested charge to the effect that, if the jury believe the evidence, they must find for the defendant.

"Evidence adduced was to the following effect: At the time of his death Davis had been a flagman on the same train for several months, and had passed Arkwright in the daytime each day during that time. At Arkwright the employer's tracks, running north and south, cross the tracks of another railway company. The stopping place for discharging passengers from the train going north was south of the crossing, and passengers alighted on the east side of the employer's track. Pursuant to his duty Davis alighted at that place and

assisted passengers on and off the train. While Davis, after the train got in motion again, WAS STANDING ON THE BOTTOM STEP OF A PASSENGER COACH, FACING TOWARDS THE REAR OF THE TRAIN, AND STOOPING OR LEANING AND LOOKING UNDER A COACH, TO DISCOVER THE CAUSE OF A NOISE THAT WAS HEARD, HAVING HIS HEAD SEVERAL INCHES OUT FROM THE SIDE OF THE COACH, HE WAS STRUCK BY THE MAIL CRANE PLATFORM, which was on the same side of the train as that on which passengers got off and on. That platform was north of the crossing. It was built around the bottom of a mail crane, and its purpose was to provide a place for persons to stand on while hanging a mail sack on the arm of the crane. It is about 4 feet high, and was 3 or 4 inches from the the outside of a passing coach. OTHER MAIL CRANES ALONG THE LINE DAVIS SERVED ON WERE IRON CRANES, WITH LADDERS, AND DID NOT HAVE A PLATFORM AROUND THEM."

(Capitals ours).

The Davis case arose in the District Court of the United States for the northern district of Alabama. The jury found for the plaintiff and the case went up on appeal to the Circuit Court of Appeals. Affirming the decision and judgment of the lower court, the Circuit Court of Appeals said:

"The above mentioned ruling is complained of on the ground that under the undisputed evidence the deceased assumed the risk due to the presence of the mail crane platform at the place above indicatd. The evidence warranted a finding that the employer was chargeable with negligence in permitting that object to be unnecessarily near the track."

"In order to charge an employe with the assumption of a risk attributable to a defect due to the employers' negligence, it must appear, not only that he knew (or is presumed to have known) of the defect, but that he knew that it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it" (Gila Valley Ry. Co. vs. Hall 232 U. S. 94, 102, 58 L. Ed. 521).———

"We are of opinion that under the circumstances disclosed by a phase of the evidence it was properly a question for the determination of the jury whether the deceased did or did not know of the location of the mail crane platform and of the danger therefrom to trainmen on passing trains. The evidence as to the circumstances under which the deceased daily passed that object was not such that it required the inference that he knew of its location and realized the danger therefrom to one who is passing on a train has the whole or part of his body out from the side of a car. *In passing on the question whether the deceased did or did not know of and appreciate the danger the jury might properly be influenced by the considerations that the mail crane platform in question was the only structure of its kind on the line on which deceased served;* that at the times when he had an opportunity to observe it he probably was engaged in assisting passengers off and on the train, and in performing other duties of a flagman incident to the stopping and starting of a train, and, so far as appears, was not charged with the duty of looking out ahead for obstructions near the track; and that, if he casually saw the platform quite a distance from him he, without being negligent, might have failed to realize how far it was from a passing car. *The case is quite different from So. Pac. Co. vs. Berkshire* 254 U. S. 416; 65 L. Ed. 335. In that case it was held that an experienced locomotive engineer who had operated many times over a railroad where

mail cranes were uniformly set up close to the track was to be presumed to have known the danger of being struck when leaning from his cab window while passing a mail crane. It is to be inferred, that, in reaching the conclusion in that case that the engineer, "perfectly well knew of the existence of the crane where it stood," the court was influenced by the considerations that he was charged with the duty of keeping a lookout ahead and that there was uniformity in the location of mail cranes with reference to the track traversed by the engineer. Pertinent authorities support the conclusion, that in the instant case it was not a necessary inference from undisputed evidence that the deceased while performing his duties as a flagman, must have become aware of the location of the mail crane platform with reference to the track and must have realized the danger therefrom (*Tex. & Pas. Ry. Co. vs Swearingen* 196 U. S. 51; 49 L. Ed. 382; *Tabor vs Davis* CCA 280 F. 612.) It follows that the above mentioned ruling was not erroneous". (Italic Ours).

When this Court after having decided the Berkshire case denied the Writ of Certiorari in the Davis case, (269 U. S. 579; 70 L. Ed. 422) it of course meant to approve the reasoning of the Circuit Court of Appeals which had expressly considered the Berkshire case. The facts in the Davis case were stronger on assumption of risk than in the case at bar. The accident happened in bright daylight—to a man accustomed to passing a mail crane every day for several months. Ours was a case of a man whose duty had never called him to the location until when at three o'clock of a foggy winter morning he was picked up in an emergency to clear up a wreck. The only previous experience he had had on the main line with semaphore posts left him to believe, as was the case in all but the fatal semaphore post, that it was perfectly safe for him to swing out from the car while watching his defective brake.

POINT II.

DISCUSSION OF SUFFICIENCY OF EVIDENCE

The case of Chicago M. & St. P. R. Co. vs. Coogan 271 U. S. 473 of course did not hold that it woudl thereafter be impossible to prove a case except by direct evidence. The use of circumstantial evidence was still sanctioned. That case only held that the circumstances must themselves be proved and not presumed, and that doctrine was not new.

We submit that on the second trial of this case, we have adhered strictly to the rule and that we have *proved* the missing links.

In the Coogan case a brakeman was killed. The question was, how did it happen, not whether the train had actually killed him. That was undisputed. The Court said p. 476: "The precise question of the decision is whether the condition of the pipe caused or contributed to cause the death of the deceased." The act of negligence complained of was that the company had allowed an air pipe to get out of order, and to remain out of order, and as Coogan's body was found in the neighborhood of the air pipe a very elaborate theory was built up after several days to the effect that Coogan's foot was somehow entangled between the pipe and the rail. Had the defendant company by having committed the act of negligence (admitted in the decision as having been proved) of leaving the defective pipe where it was caused the death? Speaking of the defective condition of the pipe, the Court said: "It had been in that condition for some months. The evidence is sufficient to warrant a finding that there was a breach of duty in this respect". The only evidence on the "precise question of the decision," which was *how* he was killed, was indeed highly remote and speculative.

The evidence did not present itself at the time Coogan's body was found. Coogan's leg was cut off and

he was found lying by the track. That was circumstantial evidence. It was so strong as proving that he was killed by the train that there was not even any question raised on the point. That, however, did not mean negligence. He might have been killed by his own fault. In looking around for proof of negligence, it was discovered "some days after the accident" that "the outside of the counter of the left shoe was scratched and showed a marked rounding depression parallel with the sole and just above the heel, and this condition was first noticed some days after the accident. In the meantime the shoes had been left in a garage and no attention was given to them. The depression in the counter was not so clear at the trial as when first noticed" (271 U. S. 476). An effort was made to build up a case on this, and it can be understood how this Court, having the power to "examine the record and if as a matter of law the evidence is not sufficient to sustain a finding that the carriers negligence was the cause of death will reverse the judgment" exercised that power and reversed the judgment. This court held that the evidence left the matter "in the realm of speculation and conjecture" which the court decided was "not enough." Left what in the realm of speculation and conjecture? Whether Coogan was killed *because the heel of his shoe was caught* between the pipe and the rail. If there was not enough evidence to prove that very point the plaintiff was out of court. If when Coogan's body was found his heel had been fastened between the pipe and the rail and his leg had been severed from his body, that would still have been circumstancial evidence. But it would not have been "speculative," because the pinioned heel would tell a clear story. Certainly in that event the Coogan case would never have been reversed. The circumstance would have been "proved" and not "presumed."

In the instant case, this Court found nothing in the record of the first trial to support the plaintiff's theory that Marshall met a violent death. By some strange omission the coroner had not held an

autopsy. It had been taken for granted that he was killed by the train. The Coroner was called, and although he at once looked for and found the semaphore post and found on the semaphore post certain telltale marks perhaps, he simply took charge of the body and turned it over to the Undertaker without going into the positive cause of death. Under those circumstances Counsel could well raise before this Court the actual question that for all anyone knew Marshall may have dropped dead. It would have been absurd to raise the question at the trial. But it was not actually settled by the record, and this Court went by the record. However, at this trial a great deal more care was taken to prove by circumstantial evidence and put in the record (not conjectural or speculative) proof of how Marshall actually came to his death.

We proved that Marshall would not have come to his death but for the semaphore post; that the semaphore post would not have caused his death except for the negligence of the defendant company in placing it too close to the track (closer than all other semaphores) and in requiring Marshall, whose duty called him to work in the yard, suddenly to go out and work on the main line where he had no experience and when he had every reason to expect that there was no unusual danger arising from obstructions near the track.

An autopsy was held before the second trial. Marshall's body was disinterred; his skull was produced in court shattered into bits, crumpled up like an egg-shell, which Dr. Powe testified could not have happened by contact with the ground and must have been caused by contact with such an object as the semaphore post. This testimony first of all silenced the suggestion that Marshall had died from natural causes. He was twenty-seven years of age and was in the prime of health. It was always a farfetched suggestion that he might have just dropped dead at the semaphore post. But in the light of Dr. Powe's autopsy death from natural causes went out of the case.

Having then definitely settled that his death came from external violence, what are the further circumstances? That his body was found right by the semaphore post; that the Coroner at the spot, at the time, looked around for the cause of death and found that the semaphore post had signs of where the body had struck (T. R. f. 90). Witnesses testified that there was blood on the semaphore post. There was still only circumstantial evidence that he did come to his death by the semaphore post.

Until the second trial, the plaintiff did not avail himself of the benefits of the rule of evidence as to the uses of *facts* admitted in an affirmative defense, the allegations of which are admissable, not to prove negligence, but for their value as facts, and this notwithstanding the affirmative defense might afterwards be withdrawn or stricken out.

However strong the circumstantial evidence was of the manner in which Marshall met his death, admissions of the parties have always been taken as stronger than either direct or circumstantial evidence, in fact as conclusive. The object of pleadings is to narrow the necessity of proof. The defendant had in its posession all the light bearing upon the death of Marshall. It had the car on which he was killed, which had the defective brakes; it had the track and the semaphore, but above all it had in its employ the train crew. It has all these now. The train crew is so much under its dominion that although they were the nearest to actual eye-witnesses of Marshall's death, our experience in using one of them at the first trial was a warning to us and we did not use him at the second. However, the defendant dared not risk the danger of using them. What implication may be gathered from this has been recently passed upon by this Court. (Mammoth Oil Co. vs. United States 72 L. Ed. 15.) But at any rate it based its defense upon them as set out in the answer and this is as potent as if all their witnesses had gone on the stand and sworn to them.

It was ncessary for plaintiff to use one of them at the first trial. While he proved enough to satisfy the jury notwithstanding he was a hostile witness ,he was not used in the second trial because in the light of Dr. Powe's and Mr. Tyner's testimony he was not necessary. The defendant, of which this Court will take judicial notice we submit, is required under the rules of the Interstate Commerce Commission to conduct an immediate inquiry into all accidents. The defendant naturally wished to avoid liability. Yet when the defendant, building its case out of the facts within its power, probably by testimony of the train crew, (while it denied negligence and each and every allegation "not specifically admitted") set up its defense and specifically alleged that it was "in leaning outward from the ladder of said freight car so as to bring his body in contact with the said semaphore ****" that Marshall was killed. A jury in passing upon testimony has no interest in giving it weight unduly for the plaintiff or defendant. It sifts the truth. It has a duty to perform and no liability to escape. The defendant itself had only "circumstantial' 'evidence in its possession. In framing its answer it had also every motive to so interpret this evidence as to absolve itself if it could from liability and find any other hypothesis upon which to account for Marshall's death. Unless convinced by that evidence that Marshall came to his death by being struck against the semaphore post it could and would have denied it. It denied negligence, but it admitted the *fact* that it was the semaphore that killed him. This was a fact that would not down, from the investigation of the train crew on the spot, from the investigation by the coroner, from the condition of Marshall's broken neck and shattered skull, from the blood on the semaphore, from the finding of the body close by the semaphore, from the testimony of the conductor who saw Marshall swinging out on the ladder watching the brakes, from all the facts and a knowledge of the circumstances peculiarly in the posession of the defendant. It was so strong that under its compulsion

defendant set it up in its sworn answer. Defendant sought in its pleadings to take advantage of that fact by alleging that he was acting against orders. We had not alleged exactly in the complaint that "Marshall was leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore." That "positive affirmation" (the term used in Blake vs. So. Ry., 126 S. C. 407) could only have been based upon experiments which defendant conducted by placing the car back at the semaphore and putting a man about Marshall's size on the ladder and putting him through the physical tests with the semaphore. So the jury thought, as the case was argued. We knew that he had been killed by the semaphore and alleged it in our complaint, and that knowledge was baesd on all the facts and circumstances accessible to us, but only the railroad company was in a position to experiment with and prove facts before it put in the answer.

The cases of A. C. L. Railroad vs. Davis, Administrator, 279 U. S. 34; 73rd L. Ed. 601;—Gulf M. & N. Railroad Co. vs. Wells, 275 U. S. 455; 72 L. Ed. 370;—A. C. L. Railroad Co. vs. Driggers, 279 U. S. 787; 73 L. Ed. 957, cited by appellant, do not affect the force of our argument, but simply fell within the doctrine of law reannounced in the Coogan case, that this Court will review evidence and pass upon its "sufficiency" etc.

Petitioner in his brief below at folio 66 argues that our evidence "taken at the second trial is much less definite as to the cause of the decedent's death than it was at the first trial." His ground for this can only be that because we failed to put up his own railroad witness whom we used at the first trial, our case was deficient. This Court held that this witness's testimony at the first trial and all other testimony put together failed to prove a case. Accepting that as the gauge of battle, we did not put up useless evidence again; we did not depend upon mere quantity of testimony. We carefully culled

out everything but testimony which went right to the heart of the case to take it out of the Coogan case.

We do not think the trial court erred in admitting that part of defendant's answer as alleged exactly how the decedent came to his death. If this was not error; if it was good law to prove that the defendant itself swore that Marshall came to his death on the ladder of the train while he was leaning outward "so far as to bring his body in contact with the semaphore post" the case is at once taken out of the field of "speculation". Petitioner realizes this and labors at folio 101 of his brief below, stating that he had clearly shown **** that the trial court committed error". Well fortunately for us the authorities are just the other way. If it is borne in mind also that the admission in the answer was only introduced for proving *facts*, there is nothing in petitioners argument that although defendant did admit this fact the force of it was completely destroyed by the allegations of contributory negligence with which it was coupled. The introduction of this *fact* had nothing to do with whether or not Marshall was right or wrong when swinging on the ladder, but only to show that he was on the ladder and was killed by the semaphore.

The answer denied each and every allegation of the complaint "not hereinabove or hereinafter specifically admitted." It has been held that the qualification "not hereinabove specifically admitted" relieves the answer of the force of a complete general denial and leaves the implication that the answer in some other part and form intends to make further admission. (Blake vs. Southern Ry. Supra.) The defendant's answer sets up contributory negligence for the purpose, and only for the purpose, under the Employers Liability Act, of mitigating damages. Contributory negligence is no longer under the Act a complete defense. In setting it up, it was necessary to allege facts upon which contributory negligence was based. The trial court was of the opinion that the plead-

ings in the case were a part of the case and that the jury could take this allegation of fact in defendant's answer as an admission in the pleadings without the formality of putting it specifically in evidence. Nevertheless, under a line of cases holding otherwise, the plaintiff had the answer produced and placed certain bracketed sections of it in proof, as a part of the testimony in the case.

> "There is a disagreement among the cases as to the necessity of introducing a pleading in the case in which filed, in evidence, as other evidence is offered, before it may be made use of as proof. By far the greater number of jurisdictions follow the rule requiring pleadings containing admissions against interests to be offered in evidence before being made use of as proof of the admissions contained therein. This rule applies alike to the pleading which remain the pleadings in the case, and the pleadings which are abandoned or superseded. In jurisdictions in which admissions contained in the pleadings upon which the case is tried are held not to constitute proof of the facts admitted but to dispense with proof thereof, there is a distinction made between the necessity of offering in evidence abandoned pleadings upon which the parties go to trial." (A L. R. 14, p. 98, 90).

The defendant offered no proof on the plea of contributory negligence.

The plaintiff had no control over the defendant's suggestion that contributory negligence went out of the case, but took the ground that even if the defendant wished to deprive itself of the benefit of the defense it could not deprive the jury of the benefit of the facts. Once admitted they could never be erased.

The Supreme Court of South Carolina, in the very recent case of Blake vs. Southern Railway, Supra, in an opinion concurred in by the whole court written by Cothran, A. J. (who wrote the dissenting opinion in the case at bar), says:

> "The defendant, however, insists that the admission which occurs in the second defense cannot be held to have destroyed the general denial in the first defense. There are two reasons why this position cannot save the defendant:
>
> (1) It is not simply an admission but a specific and positive affirmation inserted for the protection of the defendant. The defendant cannot limit its beneficial effects to its own purposes.
>
> (2) The so-called general denial in the first defense is limited by its terms to such allegations as may not "hereinafter be admitted. Those that are admitted, including the allegations of the interstate employment are excepted from the force of the general denial by its terms."

It is not amazing to us that four out of five of our State Supreme Court now disagree with Justice Cothran in his labored effort to reverse himself. The Blake case was a case directly sustaining the principles for which we contend. Our case is even stronger. That case turned upon the defense of assumption of risk which may be termed an inconsistent defense, unlike the defense of contributory negligence which was not an inconsistent defense even before the passage of the Employers Liability Act and which is now no defense but only matter of mitigation.

In the Blake case, the very able attorneys for the Railroad Company cited the same authorities which have been cited by the petitioner in the case at bar, but our Supreme Court passed them over in rendering its decision, from which the above extract has been taken. They were evidently inapplicable.

The point was also decided in the case of McJimpsey vs. Southern Ry., 89 S. C., 125 where this court says:

> "The complaint alleged that defendant was successor of the Spartanburg and Asheville Railroad Company and owner of its franchise, rights of way, tracks, locomotives and passenger cars, said tracks extending from Spartanburg, S. C., to Asheville, N. C., and that plainff became a passenger on the cars of defendant at Biltmore, N. C. The answer did not specifically deny the allegations, but stated: "It denies every material allegation of the complaint." It is extremely doubtful whether this constitutes a good general denial, because of the qualification, leaving it uncertain what the defendant considered "material" 1 Ec. Pl & Pr. 782. But passing that by, as no motion to make the answer definite was made, we notice the third allegation in the answer: "Defendant further alleges that the plaintiff in getting out on the step of one of its cars and in attempting to jump from the train while in motion, and in holding on to the hand-holds while the train was in motion, assumed all the risks incident to his so doing." Here we have a statement by defendant that the injury occurred on the cars of the defendant, and whether we view this as an admission, or as warranting an inference that the allegation of the complaint in this matter was not considered material by the defendant, and, therefore, not intended to be denied, we cannot hold that there was such a total failure of evidence on this point as to warrant direction of verdict for defendant.

In the case at bar the language which we introduced as proof "is not simply an admission but a specific and positive affirmation." We had alleged in our complaint (p. 5) that decedent "was struck by said signal device or obstruction and thrown from his train and so badly injured as to cause his death soon thereafter." In its answer the defendant alleged that the decedent came to his death "in leaning outward from the ladder of said freight car so far as to bring his body in contact with the said semaphore."

There is a Federal case cited by the Petitioner, Glenn vs. Sumner, 132 U. S. 152. The petitioner seems to stop there, without following the case down to the later case of Smith vs. Gale 144 U. S. 509, 36 L. Ed. 521, (distinguishing the case of Glenn vs. Sumner) where at pages 524-5 the court says:

> "It is true that when a general denial is pleaded in connection with the special defense of new matter, or two inconsistent defenses are set up, the admissions in the one cannot be used to destroy the effects of the other.
>
> (Glenn vs. Sumner 132 U. S. 152, 157 33 L. Ed. 301).
>
> "In this case, however, there are no inconsistent defenses; the general denial itself is qualified by a denial of each and every allegation of the complaint "not expressly admitted," the defense is, in reality a single one *****".

The answer in the case at bar denied 'each and every other allegation in said complaint not hereinabove or hereinafter specifically admitted" and is in the language of this Court in the case just cited, a case where "the general denial itself is qualified by a denial of each and every allegation of the complaint 'not expressly admitted'."

Petitioner also seems to have failed to discover a more recent Federal case, Lee Line Steamers vs. Robinson, 218 Fed. 559, where at p. 562 the Circuit Court of Appeals, again clearly distinguishes the Glenn case and unanimously upholds the doctrine for which we contend. This case decided in 1914, long after the Glenn case was never appealed to the Supreme Court, undoubtedly because of the Gale case distinguishing the Glenn case. This seems to be the established law in the Federal jurisdiction. In the Lee Line case the Court said at page 562:

> "We have seen that defendant filed two pleas, one of not guilty, and the other of justification. It is true that, where the law authorizes a defendant to set up several pleas, he may use each plea in his defense, and the admissions unavoidably contained in one cannot be used against him in another. Glenn vs. Sumner, 132 U. S. 152, 127, 10 Sup. Ct. 41, 33 L. Ed. 301. But this is so only where the defenses so made are inconsistent. Smith vs. Gale, 144 U. S. 509, 524, 12 Sup. Ct. 674, 36 L. Ed. 521. In the instant case the defenses are not inconsitent; the denial of the first plea is explained and necessarily qualified by the second; in the latter the defendant adopted the act of its servant as its own and as one of self-defense; and if that had been shown to be true it would have relieved the defednant and its servant alike of liability. N. O. & N. E. Railroad Co., vs. Jopes, 142 U. S. 18, 25, 27, 12 Sup. Ct. 109, 35 L. Ed. 919. Now, under the pleadings and the concurring testimony produced by the parties, the case stood thus: Passenger and carrier, and injury to the former inflicted with a knife by a servant of the latter in the ganway of the freight deck, at a time when this servant and others of his class were on that deck under special call to the performance of duty, with an issue only as to blame for the injury; and it is constantly to be remembered that upon this issue the defendant was seeking through a plea of

self-defense to excuse its failure to perform the high degree of care and duty it was under to protect plaintiff through his journey against misconduct and assault on the part of its servants. Steamboat Co. vs. Brockett, 121 U. S. 637, 646, 647, 648, 7 Sup. Ct. 1039, 330 L. Ed. 1049; Pendleton vs. Kinsley, 3 Cliff. 416, 426, 427, Fed. Cas. N. 10,922 per Justice Clifford, sitting as Circuit Justice; Alabama City, G. & A. Ry. Co. vs. Sampley, 169 Ala. 372, 377, 53 South, 142".

(218 Fed. p. 562).

This distinction was clearly laid down by the South Carolina Supreme Court in the McJimpsey case, Supra, where the answer denied every 'material allegation of the complaint' about which our Supreme Court said:

"It is extremely doubtful whether this constitutes a good general denial, because of the qualifications******"

And again in the case of Blake vs. Southern Railway ((Supra):

"The so-called general denial in the first defense is limited by its terms to such allegations as may not 'hereinafter be admitted'; Those that are admitted, including the allegations of interstate employment are excepted from the force of the general denial by its terms."

Applying the principle thus clearly announced by our court and the United States Supreme Court, the denial in the case at bar was a general denial only insofar as it was not qualified by facts and allegations thereinafter specifically admitted or denied.

Contributory negligence never was an "inconsistent" defense. But now,

"Under the provision of the Federal Employers Liability Act that contributory negligence is not a bar, pleas of contributory negligence pleaded in bar rather than in mitigation of damages, held defective" (Southern Ry. vs. Fisher 74 So. 580; 199 Ala. 377).

The defendant company by its plea of contributory negligence simply meant to say that it wanted the jury to decide, on the admitted facts constituting negligence, which was the more negligent of the two and to apportion damages accordingly. It put this plea in, therefore, not as an inconsistent defense but as a defense perfectly consistent with the acts alleged constituting negligence, but claiming that notwithstanding these acts it was entitled because of plaintiff's negligence to mitigation of damages. It certainly did not intend to deny that the facts upon which this plea was based were without reality and it cannot complain therefore that the jury was asked to accept them as true.

The North Carolina Supreme Court (Jones vs. Norfolk Southern, 97 S. E. 52), following a long line of decisions, in a late case brought under the Employer's Liability Act, passing upon the same question, said:

> "Defendant excepted further to the rulings of the court on questions of evidence: First ,that his honor allowed plaintiff to put in evidence a separate clause of section 5 of the answer, as follows:
>
> That in order to disconnect the said moving engine and car, it was necessary as a part of said operation to apply aid to the engine so as to slow the same down.
>
> "And further that he refused to permit defendant to introduce other portions of said answer materially affecting said admissions. In this connection, his honor offered to allow defendant in reply to intro-

duce the accompanying statement of this paragraph, as follows:

"That, pusuant to said purpose, the said engine and cars were proceeding along the track and in the usual and customary manner and the said engine was slowed down and the car uncoupled from said engine."

"The defendant declined and, in addition, offered in evidence the entire remaining portion of the paragraph and excepted to the ruling excluding the additional statement.

"It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that, in such case, it is open to the opposing party to introduce such qualifying matter if he so desires. Wade vs. Contracting Co., 149 N. C. 177, 62 S. E. 919; Sawyer vs. Railroad, 145 N. C. 24, 58 S. E. 598, 22 L. R. A. (N. S.) 200; Lewis vs. Railroad, 132 N. C. 382, 43 S. E. 119. A correct application of the principle is in full support of his honor's ruling on both questions. The part of paragraph 5 admitted was of a distinct and separate fact relevant to the issue. His honor offered to allow defendant to introduce in reply any accompanying allegations which could properly be said to qualify or explain the fact, and the additional allegations of the answer insisted on by appellant, averring contributory negligence by plaintiff, were in no sense qualifying or explanatory of the fact admitted and were therefore properly excluded."

In the case at bar the defendant expressly declined to put in any "qualifying matter", but attempted to withdraw his plea of contributory negligence and thus, as he thought not to "qualify", but to escape the facts of his own pleading.

In view of the foregoing we respectfully submit that the petition for the Writ of Certiorari be denied.

Respectfully submitted:

LIONEL K. LEGGE,
of Counsel for Respondent.